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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

OAK BEACH INN CORP.
and
ROBERT W. MATHERSON,

Petitioners,

against

BABYLON BEACON, INC., d/b/a
BABYLON BEACON NEWSPAPER,
EDWARD D. WOLFE and JANE D. WOLFE
and
JOHN and/or JANE DOE(s)
being and intending to be the writer(s) of a
"Letter to the Editor" in the April 9th edition of
the Babylon Beacon,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the ruling of the New York State Court of Appeals, creating an absolute privilege to *Sullivan* libel defendants denying disclosure of their source even when the material received from the source is published verbatim in an "anonymous" letter to the editor, has upset the constitutional balance, struck by *New York Times* v. *Sullivan* and its progeny, which permits liability for defamatory falsehood under the reckless disregard branch of actual malice where plaintiff has satisfied the heavy burden of proof regarding the publisher's subjective state of mind?

2. Whether the ruling of the New York State Court of Appeals has denied Petitioner's their right to due process of law under the Fourteenth Amendment by creating an absolute privilege of non-disclosure of the newspaper's sources and therefore its "state of mind" thus effectively denying petitioners absolutely the right to sue?

3. Whether the ruling of the New York State Court of Appeals denies Petitioners their right to equal protection of the laws under the Fourteenth Amendment by creating a class of persons immune from suit in *Sullivan* libel cases?

4. Whether the ruling of the Court of Appeals has immunized from liability all malicious defamations where the basis for liability arises during the editorial process?

5. Whether the "Shield Law" New York State Civil Rights Law §79(h) as applied to Petitioners herein is unconstitutional as violative of Petitioners right of equal protection and due process under the Fourteenth Amendment?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF CASE, FACTS AND PRIOR PROCEEDINGS	2
THE DECISIONS BELOW	5
REASONS FOR GRANTING THE WRIT—	
I. The Creation of an Absolute Privilege of Non-Disclosure of Anonymous Sources in Libel Cases in the State of New York Has Fundamentally Altered the Principles of *New York Times* v. *Sullivan* and Its Progeny	6
1. This Court's Delicate Balancing of Important Social Interests from *Sullivan* to the Present Has Never Included a Recognition of the Absolute Privilege Granted by the Court Below	6
2. The Confidential Source Cases	9
3. The Balance Previously Struck by this Court Has been Ignored by the New York State Court of Appeals	10
4. The Decision Below Has Created Substantial Confusion and Uncertainty in *Sullivan* Libel Cases	14
II. The "Shield Law" Of The State of New York Is Not A Barrier To The Disclosure Ordered By The Trial Court	17
1. The "Shield Law" If it Applies Solely Protects Newsmen From Being Held in Contempt of Court	17
2. The "Shield Law" Civil Rights Law § 79(h) by its own definitions does not apply to the "Letter to The Editor" in Issue Here	21

3. The Sanctions Imposed By The Court Below were Appropriate Since Defendants-Respondents Wilfully Violated An Order For Pre-Trial Discovery Crucial to Plaintiffs-Appellants Cause of Action 23

CONCLUSION 27

APPENDIX

A. State of New York Court of Appeals Opinion 1a

B. State of New York Court of Appeals Order 15a

C. Supreme Court of the State of New York, Appellate Division, Second Judicial Department Order on Appeals from Order 16a

D. Supreme Court of the State of New York, Appellate Division, Second Judicial Department Order 24a

E. Supreme Court of the State of New York, Trial-Special Term Part Suffolk County, Order Justice Frank P. DeLuca 25a

F. Supreme Court State of New York Special Term, Part I Suffolk County Opinion and Order Justice Paul T. D'Amaro 27a

G. Supreme Court of the State of New York Special Term Part I Special Term Part I Suffolk County Order Justice Frank P. DeLuca 32a

TABLE OF AUTHORITIES

CASES:	Page
Andrews v. *Andreoli*, 92 Misc.2d 410, 417 (Onondaga Co. 1977)	17
Branzburg v. *Hayes*, 408 U.S. 655 (1972)	9, 18
Brogan v. *Passaic Daily News*, 22 NJ 139	18
Bycel v. *Freeman*, 95 Misc.2d 270 (Nassau Co. 1978)	25
Caldero v. *Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791 (Sup.Ct. 1977), cert. denied, 46 U.S.L.W. 3288 (U.S. Oct 31, 1977)	9
Carey v. *Hume*, 492 F.2d 631 (D.C. Cir.), pet. for cert. dismissed, 417 U.S. 938 (1974)	9, 18
Carson v. *Allied News Co.* 529 F.2d 206 (7th Cir. 1976)	12
Chaplinsky v. *New Hampshire* 315 U.S. 568, 86 L Ed 1031, 62 F Ct 766	9
Curtis Publishing Co. v. *Butts*, 388 U.S.130 (1967)	7, 8
Dack v. *Beni Broadcasting of Rochester*, 101 Misc.2d 490 at 501 (citing Matter of *Wolf* v. *People*, 261 Misc.2d 256, 261 (N.Y. Co. 1972). *Aff'd.* 39 A.D.2d 864 (1st Dept. 1972)	22
Davis v. *Davis*, 88 Misc.2d 1 (Rensselaer Co., 1976)	22
Electorque Associates, Inc. v. *Arverne Houses, Inc.*, 73 A.D.2d 682 (2d Dept. 1979)	24
Feingold v. *Walworth Bros., Inc.*, 238 N.Y. 446 (1924) (238 N.Y. at 451, 452)	20, 25, 26
F&J Enterprises, Inc. v. *Columbia Broadcasting Systems*, 373 F.Supp. 292 (N.D. Ohio 1974)	12
Garland v. *Torre*, 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958)	9
Garrison v. *Louisiana*, 379 U.S. 64 (1964)	8, 9
Gertz v. *Robert Welch, Inc.* 418 U.S. 323 (1974)	7, 8
Herbert v. *Lando*, 441 U.S. 153, 60 L Ed 2d 115, 99 S Ct 1635 (1979)	8, 9
Herbert v. *Lando*, 568 F2d 974	10, 11, 13

Table of Authorities Continued

Page

Hennigan v. *Buffalo Courier Express Co., Inc.*, 85 A.D.2d 924, 925 (4th Dept. 1981) 22

In Re Estate of Porter, 64 Misc.2d 1016 (Sur.Ct. N.Y. Co. 1970) 24

Katz v. *Katz*, 68 A.D.2d 536 (2d Dept. 1979) 25

Katz v. *Travelers Indem. Co.*, 39 A.D.2d 516 (1st Dept. 1972) 24

Koump B. Smith, 25 N.Y. 2d 287 23

MacNeil v. *Columbia Broadcasting System Inc.*, 66 F.R.D. 22 (D.D.C. 1975) 12

Maid Maintenance Serv. v. *General Acc. Fire & Life Assur. Corp.*, 56 A.D. 2d 134 23

Matter of Wolf v. *People*, 69 Misc. 2d 256, aff'd 39 AD 2d 864 22

McNair v. *The Hearst Corporation*, 494 F.2d 1309 (7th Cir. 1974) 12

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) ..... passim

People v. *Cruz*, 48 N.Y.2d 419, 428 (1979) 19

People v. *Henriques & Co., Inc.*, 267 N.Y. 398 (1935) .. 25

People v. *Iannaconne*, 112 Misc.2d 1057, 1060 (N.Y. Co., 1982) 19

People v. *Korkala*, Supreme Court, New York County, New York Law Journal, September 19, 1983, p.16, col.1, at col.4 23

People v. *Monroe*, 82 Misc.2d 850, 854 (Bronx Co. 1975) 17

People v. *Zaparino*, 97 Misc.2d 181, 190 (Kings Co. 1978) 17

Regano v. *Time Inc.*, 302 F.Supp. 1005 (M.D. Fla. 1969), aff'd 427 F.2d 219 (5th Cir. 1970) 12

Rodriguez v. *Sklar*, 56 A.D.2d 537 (1st Dept. 1977) ... 25

Table of Authorities Continued

Page

Rosenblatt v. *Baer*, 383 U.S. 75 (1966) 7

Rosenberg v. *Trachtman*, 103 Misc.2d 472 (Queens Co. 1980) 25

Rosenbloom v. *Metromedia, Inc.*, 403 U.S. 29 (1971) .. 7

St. Amant v. *Thompson*, 390 U.S. 727 (1968) 8

Time, Inc. v. *Firestone*, 424 U.S. 448 (1976) 7

United States v. *Nixon*, 418 U.S. 683, 41 L Ed 2d 1039, 94 S Ct 3090 (1974) 8

Vandenburg v. *Newsweek, Inc.*, 441 F 2d 378 12

WBAI-FM v. *Proskin*, 42 A.D.2d 5, 7 (3rd Dept. 1973) 17

STATUTES:

Judicial Code, 28 U.S.C. §1257(2) (1970) 2

Ariz.Rev.Stat. §12-2237 (West Supp.1977) 19

McKinney's 1970 Session Laws of New York, p.3112 ... 20

7B McKinney's Consolidated Laws of New York Annotated CPLR 3126 ..... passim

7B McKinney's Consolidated Laws of New York Annotated CPLR
§ 3102 (c) 2, 3
§ 3120 3
§ 4502 27
§ 4503 27
§ 4504 27
§ 4505 27

8 McKinney's Consolidated Laws of New York Annotated Civil Rights Law, 79(h) ..... passim

Memorandum of Law (Attorney General Robert Abrams to Governor Nelson Rockefeller) 20

Table of Authorities Continued

Page

OTHER AUTHORITIES:

I Wigmore on Evidence § 10, p. 294 (3d Ed, 1940) 14

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Newsgather's Non-disclosure Privilege, 99 ALR 3rd 37 at 74-77 and 112-114 18

Sack, Robert D., *Libel, Slander and Related Problems*, Practising Law Institute (1980) 19

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BABYLON BEACON NEWSPAPER,
EDWARD D. WOLFE and JANE D. WOLFE
and JOHN and/or JANE DOE(s)
being and intending to be the writer(s) of a
"Letter to the Editor" in the April 9th edition of the
Babylon Beacon,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Justices of the Supreme Court of the United States:

Petitioners, Oak Beach Inn Corp. and Robert W. Matherson, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York affirming the order of the Appellate Division of the Supreme Court of the State of New York, Second Department which reversed the prior order of the Supreme Court of the State of New York, County of Suffolk and held that under the New York State Civil Rights Law §79(h) (L. 1970, CH. 615 §1) Petitioners cannot obtain the name(s) of the author of an anonymous defamatory public letter to the editor nor can normal and customary statutory sanctions

be imposed for failure to disclose the author's identity against a newspaper which has published the anonymous defamatory letter to the editor and refused to reveal the name and address of the letter's author.

OPINIONS BELOW

The Opinion and Order of the Court of Appeals of the State of New York are reproduced in Appendices A and B of this Petition. The opinion and order of the Appellate Division of the Supreme Court of the State of New York are reproduced in Appendices C and D. The opinion and orders of the Supreme Court of the State of New York, County of Suffolk are reproduced in Appendices E, F, and G.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on May 10, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (2).

STATEMENT OF CASE, FACTS AND PRIOR PROCEEDINGS

On or about April 9, 1981 an anonymous "Letter to the Editor" was published in Respondents' newspaper by the Respondents which Petitioners assert contains false, defamatory and malicious matter concerning Petitioners herein. Petitioners unable to ascertain the name and/or names of the letter writer in any other way, obtained an Order to Show Cause on September 23, 1981, requiring Respondents to show cause why they should not be ordered to appear and submit to examination pursuant to New York Civil Practice Laws and Rules ("CPLR") §3102(c) to testify as to the name and last known address of the anonymous letter writer. Simultaneously Petitioners served each known defendant with a summons and verified complaint.

Respondents opposed the motion with a one page attorney's affirmation dated September 25, 1981, wherein it was

argued that disclosure of the identity of the letter writer was premature and that serious constitutional issues were involved. Respondents did not invoke any privilege, nor did they allege any confidentiality. Petitioners submitted a Reply, contending that CPLR 3102(c) authorized the court to compel discovery prior to the institution of the action and further argued that there were no serious constitutional issues involved. In light of the limited nature of Petitioners request and their inability to obtain the information by any other means, Petitioners strongly contended that there were no "serious constitutional issues" to be determined and discovery of the letter writer was vital to the suit.

On October 6, 1981, New York State Supreme Court Justice Frank P. DeLuca rendered a decision and signed a short form Order, pursuant to CPLR 3120(a)(1)(i) directing Respondents to produce a copy of the letter in question at 10:00 A.M. on November 2, 1981 and further directing Respondents to preserve the letter pursuant to the original Order of Justice Geiler signed September 23, 1981.

Respondents then obtained a substitution of counsel and moved for leave to reargue the Decision and Order of Justice DeLuca. The Respondents' new counsel sought to for the first time invoke New York Civil Rights Law § 79(h) (the "Shield Law") as compelling authority for the denial of the Petitioners' demand for discovery of the offending anonymous letter to the editor. The application for leave to reargue was granted, but upon reargument the Court adhered to its original decision. An Order dated October 29, 1981 was entered holding that the "Shield Law" does not preclude imposition of sanctions authorized by CPLR 3126, (see page 25 herein).

On November 2, 1981, the counsel for the Petitioners and Petitioner Matherson appeared at Respondents' offices and demanded production of the anonymous letter, pursuant to the terms of the Order of Justice DeLuca. The Respond-

ents refused to comply with the Order. Respondents failed to request a stay until May 11, 1982 after they had been in contempt of a court order for six months.

On January 11, 1982 Petitioners sought the imposition of sanctions (CPLR 3126), striking the Respondents' answer, and further seeking judgment by default against the Respondents, and, alternatively and/or additionally an order holding Respondents in contempt. Respondents cross moved for summary judgment.

On April 26, 1982 New York State Supreme Court Justice Paul T. D'Amaro rendered a Decision and Order directing the Respondents' answer stricken unless the Respondents produced the subject letter within fifteen (15) days from notice of entry of the Order to the Petitioners for inspection and copying. Respondents' cross motion for summary judgment was denied without prejudice. On the fourteenth day after notice of entry, Respondents obtained an Order to Show Cause *ex parte* staying the proceedings pending the hearing and determination of Respondents' application to the Supreme Court of the State of New York, Appellate Division, Second Department for a stay pending appeal. The motion was granted.

Contrary to Respondents' contention in State Court, their pleadings were not struck by the trial court. Rather, the trial court ordered Respondents' pleadings stricken unless Respondents complied with the prior order of Justice DeLuca granting Petitioners the opportunity to discover and inspect the anonymous letter in question. The obvious reason for this sanction was the utter disregard by Respondents of two prior court orders (going to the very center of the litigation herein) over a period of six months and their obvious intention to refuse to comply with the court's orders indefinitely. On May 10, 1984 the New York State Court of Appeals affirmed with a strong dissent the Appellate Division decision but on different grounds.

THE DECISIONS BELOW

Respondents' appeal was perfected for the November, 1982 Term of the New York State Supreme Court, Appellate Division, Second Department and consolidation of the two appeals was granted on consent. On appeal the Appellate Division, Second Department reversed the orders of the Supreme Court, stating in a Per Curiam opinion *inter alia* that "although the Shield Law is cast in negative terms to shield the newsman from contempt ... the salutary purpose of the Shield Law would be unduly restricted if journalists invoking the privilege were subjected to large monetary judgments in civil actions."

Petitioners were granted permission to appeal to the New York State Court of Appeals by order of the Appellate Division dated July 15, 1983.

The Appellate Division certified the following question to the New York Court of Appeals: "Was the order of this Court dated March 7, 1983 properly made?"

The Court of Appeals, with a dissenting opinion by Judge Jasen, agreed with the Appellate Division that the Orders below should be set aside but based its decision on a different ground. The Court of Appeals expressly recognized that the New York State Legislature has never established an absolute right nor granted journalists complete immunity from all legal consequences in refusing to divulge evidence relating to a news source. It further recognized that the "Shield Law" cannot be read to include general exemption from sanctions of New York Civil Practice Law and Rules §3126 which authorizes the imposition of sanctions for parties who refuse to abide by disclosure orders.

Despite this dictum the New York Court of Appeals held that the "Shield Law" barred petitioners from utilizing available remedies and sanctions to require the newspaper to reveal the author of the anonymous letter, thereby

permitting respondents to effectively control the course of petitioners lawsuit by unilaterally deciding what is discoverable. The Court in applying the "Shield Law" established total immunity and in its application created a class of persons exempt from libel actions and thereby precluded petitioners from pursuing their right to recover damages caused by the defamatory publication.

In a strong dissent, Judge Jasen recognized that petitioners' ability to satisfy the standard set forth in *New York Times* v. *Sullivan*, 376 U.S. 254 requiring proof that respondents acted with actual malice in publishing the anonymous letter may well turn upon their learning the identity of and the motivation of the unknown author. As Judge Jasen further noted if Courts are allowed to deprive a plaintiff of discoverable information such as the letter's author then future plaintiffs will be precluded from ever again successfully prosecuting a defamation action against journalists and without question the majority's decision is the "death knell" of the petitioners' action.

REASONS FOR GRANTING THE WRIT

I. The Creation of an Absolute Privilege of Non-Disclosure of Anonymous Sources in Libel Cases in the State of New York Has Fundamentally Altered the Principles of *New York Times* v. *Sullivan* and Its Progeny.

1. This Court's Balancing of Important Social Interests from *Sullivan* to the Present Has Never Included Recognition of the Absolute Privilege Granted by the Court Below.

The case before this Court has wide ramifications.[1] From the decision in *New York Times* v. *Sullivan* to the present

[1] The ground-breaking nature of the decision below was featured in the national press. [NY Law Journal, National Law Journal, AP & UPI articles]

the Supreme Court has sought to fashion workable principles[2] in libel law which balance the concerns of the First Amendment for permitting uninhibited robust and wide-open debate on public issues with the historic recognition of a right of legal redress to persons damaged by false and defamatory publications. Striking that balance has led the Court to grant significant additional protections from liability to those who have published alleged false defamations about public officials and, thereafter, public figures.[3] Although the position had been urged upon the Court, a majority of the Justices have never concluded that securing the guarantees of the First Amendment required an elimination of liability to public officials or figures who have been libeled.

In *Sullivan* the Court concluded that it was essential to establish a "defense for erroneous statements honestly made" in order to fulfill the constitutional guarantees. This defense was therefore formulated to require a public official or figure seeking recovery for a defamatory falsehood to prove that the statement was made with " 'actual malice'-that is, with knowledge that it was false or with

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[2] See e.g.: *Rosenblatt* v. *Baor*, 383 U.S. 75, 86 (1966); *Gertz* v. *Robert Welch*, Inc., 418 U.S. 323,341-343 1974). In *Rosenblatt*, *supra*, at 86, Mr. Justice Brennan wrote that "important social values ... underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation."

[3] The area encompassed by these additional protections had changed during the years as the Court has sought to refine this balance. Compare: *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc.* v. *Firestone*, supra, 424 U.S. at 456. In *Firestone*, supra, 424 U.S. at 456. Mr. Justice Rehnquist described the Gertz decision as an attempt to seek "a more appropriate accommodation between the public's interest in an uninhibited and its equally compelling need for judicial redress of libelous utterances." The proper status of petitioners in relationship to this area had not been determined although it is assumed at this stage that they fall within the area subject to the *Sullivan* principles.

reckless disregard of whether it was false or not . . ." The scope of the reckless disregard standard has been considered on a number of occasions by the Court. The critical outcome of these considerations has been the formulation of a subjective test in determining the state of mind of the reporter in regard to the truth or falsity of the statements published. In *Garrison* v. *Louisiana*, 379 U.S. 64,74 (1964), the court described the required state of mind to establish a "reckless disregard for truth" as one where the defendant has made the false statements with a "high degree of awareness of their probable falsity"; in *Curtis Publishing Co.* v. *Butts*, 388 U.S. at 153, Mr. Justice Harlan described it as "the publisher's awareness of probable falsity": Mr. Justice White in *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968) defined the required state of mind as one where the publisher "entertained serious doubts as to the truth of his publication," and, finally, the subjective nature of the test was noted in the Court's statement in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 344 n. 6, that *St. Amant* "equated reckless disregard of the truth with subjective awareness of probable falsity. . . ."

Since 1964 the Court has imposed upon plaintiffs in *Sullivan* cases a heavy burden of proof concerning the evidence a plaintiff must marshal to satisfy the subjective test required to establish "reckless disregard." Never, during these 14 years of decisions, has the evolution of the subjective state of mind test triggered an accompanying prohibition on the direct proof of that state of mind or any concern that the proof demanded by the test will threaten an allegedly immunized area of media activity.

This Court has previously recognized that even the President of the United States does not have an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding. *United States* v. *Nixon*, 418 U.S. 683, 41 L Ed 2d 1039, 94 S Ct 3090 (1974).

Moreover, this Court has more recently said in *Herbert*

v. *Lando*, 441 U.S. 153, 60 L Ed 2d 115, 99 S Ct 1635 (1979) in regard to the creation of a constitutional privilege foreclosing direct inquiry into the editorial process as a press protection that "Only complete immunity from liability for defamation would effect this result and the Court has regularly found this to be an untenable construction of the First Amendment." 441 U.S. 153, 176.

2. The Confidential Source Cases

In *Branzburg* v. *Hayes*, 408 U.S. 655 (1972) this Court rejected the notion that the media's need to acquire newsworthy material justified an absolute prohibition upon discovery of the newsman's source. *Branzburg* did not create an absolute privilege but rather (relying upon *Garland* v. *Torre*, 259 F2d 545 550 (2d Cir.1958) Cert. denied, 358 U.S.910 (1958) at 686) specifically recognized that in libel cases the newsman's source is not immune from discovery.[4]

Neither *Sullivan* nor any of its progeny ever extended a constitutional protection to a false and defamatory statement dishonestly made.[5] Despite the demonstrated impact of source disclosure upon press activities, this Court was unwilling in *Branzburg* to grant a Constitutional privilege to the press, yet the decision of the New York State Court

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[4] See also *Carey* v. *Hume*, 492 F. 2d 631,637 (D.C. Cir. 1974). pet. for cert. dismissed, 417 U.S. 938 (1974); *Caldero* v. *Tribune Publishing Co.*, 98 Idaho 288, 562 P2d 791, cert. den, 46 U.S.L.W. 3288 (U.S. Oct. 31, 1977)

[5] In *Garrison* v. *Louisiana*, supra, 379 U.S. at 75, Mr. Justice Brennan wrote:

> Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572, 86 Led 1031, 62 S Ct. 766. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

of Appeals herein grants an absolute privilege to the *Sullivan* reporter defendant to refuse to reveal critical state of mind matters arising at any time during the editorial process, namely the identity of the letter writer and even whether a letter writer exists.

Since defamation actions premised on the actual malice standard are constitutionally permissible, discovery of direct proof of actual malice cannot soundly be said to have an unconstitutional chilling effect on the exercise of First Amendment rights. As Judge Meskill stated in his dissent in the Circuit Court of Appeals, *Herbert* v. *Lando*, 568 F2d 974, (reversed 441 U.S. 153) which position was later substantially adopted by this Court:

> Under *New York Times v. Sullivan*, 376 U.S. 254 (1964). [Herbert] may prevail if he proves that the defendants acted with "actual malice," that is, knowing or reckless disregard of the truth. The major purpose of this lawsuit, therefore, is to expose the defendants' subjective state of mind-their thoughts, beliefs, opinions, intentions, motives and conclusions—to the light of judicial review. Obviously, such a review has a "chilling" or deterrent effect. It is supposed to. The publication of lies should be discouraged. The discovery by a libel plaintiff of an editor's state of mind will not chill First Amendment activity to any greater extent than it is already being chilled as a result of the very review permitted by New York Times v. Sullivan.

3. The Balance Previously Struck by This Court Has Been Ignored by the New York State Court of Appeals.

The decision below represents a drastic change in the balance of interest struck by *Sullivan* and its progeny. The Court below has imposed an additional monumental burden on libel plaintiffs by prohibiting direct proof of a concededly critical *Sullivan* element—actual malice. The subjective nature of the state of mind predicate needed to establish actual malice means that only the defendant will be able to

give any direct evidence on this issue. Depriving plaintiffs of the opportunity to discover the identity of one or more defendants and to fully discover the state of mind of the known defendants is to overwhelmingly tilt the balance in *Sullivan* libel cases in favor of defendants. In his opinion in the District Court, in *Herbert* v. *Lando* Judge Haight wrote:

> If the malicious publisher is permitted to increase the weight of the injured plaintiff's already heavy burden of proof by a narrow and restricted application of the discovery rules, so that the plaintiff is denied discovery into areas which in the nature of the case lie solely with the defendant, then the law in effect provides an arras behind which malicious publication may go undetected and unpunished. Nothing in the First Amendment requires such a result.

A further decisive advantage to libel defendants resulting from the decision below is the power given to libel defendants to control the direct evidence available at trial on the critical issue of state of mind and to shape that issue in such a fashion so that only evidence favorable to them will be adduced. As Judge Jasen stated in his strong dissent to the majority opinion in the New York State Court of Appeals decision at page 3:

> However, defendants' novel suggestion that they may control the course of plaintiffs' lawsuit by dictating what plaintiffs may discover, simply by stating that they do not intend to rely upon certain information which is of great importance to the plaintiffs' case, in preparing their defense and thereby preclude plaintiffs from obtaining that information, is outrageous. Not only is such a rule grossly unfair to the innocent plaintiffs here, but it also ignores well-settled principles governing discovery procedures and distorts the adversarial process.

He further notes at page 5 of his dissent:

> Furthermore, the sanction the majority favors would be meaningless because there would be no need for

> defendants to introduce evidence on the issue of malice if plaintiffs were prevented from obtaining information—the letter writer's identity—essential to the preparation of their case. Indeed, depriving plaintiffs of the information they seek and which this court agrees is discoverable will effectively sound the death knell for plaintiffs' lawsuit.

The prohibition upon plaintiff's inquiring as to defendants' state of mind created by the decision below does not prevent defendants from testifying themselves as to their conclusions, the bases for those conclusions and their intentions when they believe such testimony would be helpful to their case. In fact, in the past, libel defendants during discovery have shown no reluctance to disclose their state of mind under such circumstances. See (e.g). *Carson* v. *Allied News Co.*, 529 F2d 206, 211-212 (7th Cir. 1976) (reporter's deposition testimony on "basis" for certain statements in the article); *McNair* v. *The Hearst Corporation*, 494 F 2d 1309, 1311, n.2 (9th Cir. 1974) (publisher's deposition testimony on the "impression" created by the article); *Vandenburg* v. *Newsweek, Inc.*, 441 F.2d 378, 380 (5th Circ.), cert. den. 404 U.S. 864 (1971) (deposition testimony as to reporter's initial belief in plaintiff subsequent disbelief and confirmation of his doubts); *MacNeil* v. *Columbia Broadcasting System, Inc.*, 66 F.R.D. 22, 25 (D.D.C. 1975) (producer's affidavit on summary judgment motion described his state of mind when he included in the broadcast certain experts from a lecture); *F&J Enterprises, Inc.* v. *Columbia Broadcasting Systems*, 373 F.Supp. 292, 298 (N.D. Ohio 1974) (affidavits by Wallace and a producer that they had no reason to doubt the truth of certain matters because of the reputation of the interviewee and that they did not bear any personal malice or ill will towards plaintiff); *Ragano* v. *Time, Inc.*, 302 F.Supp. 1005, 1008-1010 (M.D. Fla. 1969), aff'd, 427 F.2d 219 (5th Cir.

1970) (deposition testimony of publisher's vice-president as to why known facts were deleted from a story.)[6]

Judge Oakes' concurring opinion in the Court of Appeals in *Herbert* v. *Lando* parallels the manner in which the New York State Court of Appeals fails to cite any authority whatsoever when he says he viewed the decision below in the instant case as "limit[ing] a procedural rule, not ... alter[ing] the substantive law of libel". However, in striking a balance between First Amendment protections and the social values underlying the law of defamation, procedural rules, as well as the substantive law, have been considered by this Court. Thus, the procedural rule governing the nature of the burden of proof borne by libel plaintiffs has since *Sullivan* been regarded as one of the important features of the balance drawn by *Sullivan* and its progeny. By adding to the libel plaintiff's burden of proving his case with "convincing clarity," (*Sullivan, supra.* 276 U.S. at 285-286,) a prohibition against obtaining direct proof of the defendant's state of mind, as the decision below holds, ruptures the balance which this Court has carefully and arduously constructed since *Sullivan.*"[7]

Further, to view the decision of the New York State Court of Appeals as merely a procedural rule involving an

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[6] The media had apparently interpreted the decision below in *Herbert* v. *Lando* as permitting it, on a case-by-case basis, to determine when to disclose its state of mind and when to remain behind the absolute privilege erected by the decision and doubtlessly will do so in this instance. See: The New York Times, "Libel Case Against CBS Raises Questions About the Release of Data", November 15, 1977, p. 32 col. 6.

[7] Judge Oakes further wrote in *Herbert* v. *Lando* dissimilar to Judge Jason's dissent in the New York State Court of Appeals that limiting plaintiff's discovery "may deprive him of adducing the best proof of malice in the common law sense of ill will toward the plaintiff" (41a, n31). But plaintiff has been foreclosed from questions regarding defendant's state of mind on matters presented on the Program and conflicting matters excluded from the Program; that is, questions directed not to common law malice but to required actual malice under *Sullivan.*

area of proof is to ignore the obvious: where the means of proving a particular matter required for establishing liability is foreclosed, then the liability itself has been nullified.[8] In view of the heavy burden of proof imposed upon a libel plaintiff, and the subjective test for establishing the requisite state of mind for reckless disregard, the decision of the Court below has effectively eliminated liability for reckless disregard by prohibiting direct proof of the requisite state of mind of the defendant. What this Court has declined to do since *Sullivan*—grant an immunity to the media for publications made with a reckless disregard of their truth—has been effectively accomplished by the decision of the Court below.

4. The Decision Below Has Created Substantial Confusion and Uncertainty in *Sullivan* Libel Cases.

The confusion and potential for abuse arising from the decision of the Court of Appeals furnish additional reasons for this Court to issue the writ of certiorari to review that decision. While the New York State Court of Appeals has prohibited compelled disclosure of the editorial process and the letter writer's identity or even existence, the bounds of that process has not been set. The concept of "editorial process" suffers from a spongy quality which may expand to subsume the entire publishing process as in *Herbert*.[9] For example, is a plaintiff foreclosed from all discovery of

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[8] Edmund Burke put it simply many years ago: "to refuse evidence is to refuse to hear the cause." 1794, Mr. Edmund Burke, Report to the House of Commons, Debrett's History of Hastings' Trial, 1796, pt. VII, Suppl. p. xxiii, 31 Parl. Hist. 324, quoted in I Wigmore on Evidence §10, p. 294 (3d Ed. 1940).

[9] The decision-making process protected by the decision below has been described as begin[ning] when a news organization first decides to look into a subject and continu[uing] until the finished product appears in print or is broadcast." *New York Times*,, November 15, 1977, *supra*, col. 3.

editorial control and judgment exercised by the reporter in preparing and presenting the publication including: the steps the reporter determined were necessary to ascertain the truth or falsity of the matters being investigated, which steps were abandoned during the course of the investigation, what means of verification were sought to be followed and what was actually done, how were contradictory materials handled, what factors determined the manner in which contradictory material was treated, how were questions of credibility and reliability of persons interviewed resolved?

The questions triggered by the decision are almost limitless: does the protected area of editorial process include the reporter's pre-investigation conclusion that the only newsworthy publication would be one that portrayed plaintiff as a liar or his conclusion that the only material to be considered for publication is that which supports the particular position of people whose favor the publisher seeks? May a reporter still be asked who he considered interviewing but rejected and who he sought to interview but did not, as well as who he actually interviewed? Can the media, on a case-by-case basis, effectively decide the bounds of the protected area by disclosing some aspects of the editorial process and foreclosing other areas with the claim of privilege?[10]

The depth of the protection granted editorial judgment is similarly subject to confusion and abuse. The conclusion that the mere discovery of what occurred during the editorial process so chills First Amendment rights as to require its prohibition necessarily creates a question as to whether any state intrusion regarding that process will be upheld against a First Amendment challenge. Without review by this Court, the decision below may well afford

[10] The Court of Appeals decision necessarily results in selective disclosure since the reporter is free to selectively disclose aspects of the editorial process deemed helpful to the defense while plaintiff is prohibited from discovering any other aspects.

grounds for a finding that government intrusion in the form of a judicial proceeding for damages is constitutionally impermissible where the claim of actual malice is based upon activities occurring during the editorial process. Thus, in addition to the other fundamental changes in the constitutional law of libel effected by the decision below, a major, although ill-defined, area of media activity could be totally removed from any liability that would otherwise arise under *Sullivan* principles.

As Judge Jasen points out in a footnote to his dissent at page 4 in the New York State Court of Appeals:

> By way of illustration, consider the following hypothetical situation: the anonymous letter writer was a reporter for the defendant newspaper who harbored a widely known personal animosity toward the proprietors of the Oak Beach Inn and who had publicly declared long ago that he would some day make trouble for the plaintiffs. Clearly the letter writer's identity would be relevant and extremely important to the plaintiffs in helping them to prove that the defendants acted with malice or in reckless disregard for the truth in publishing the allegedly defamatory letter. However, under the majority's reasoning, plaintiff would never learn the author's identity simply because defendants wrongfully refused to disclose it. Worse yet, the trial court would be powerless to order the defendants' answer stricken pursuant to CPLR 3126(3) because defendants promised not to make "affirmative use" of the author's identity in preparing their defense. Such a rule finds no support in the statutes, case law or logic.

What means if any would the plaintiffs or future plaintiffs have in meeting *Sullivan* standards in the State of New York or is the New York press now completely immune from suit?

II. The "Shield Law" of the State of New York Is Not a Barrier to the Disclosure Ordered by the Trial Court.

1. The "Shield Law" If It Applies Solely Protects Newsmen From Being Held In Contempt of Court.

Section 79(h) of the New York Civil Rights Law (the "Shield Law") relating to special provisions for news media personnel, is limited in the scope of its protection to "shielding" newsmen from the sanction of contempt. *People* v. *Monroe*, 82 Misc.2d 850, 854 (Bronx Co. 1975); *Andrews* v. *Andreoli*, 92 Misc.2d 410, 417 (Onondaga Co. 1977); *People* v. *Zaparino*, 97 Misc.2d 181, 190 *et. seg.* (Kings Co. 1978).

The language of Civil Rights Law § 79(h) specifically states, in pertinent part, that "no professional journalist ... shall be adjudged in contempt by any court ... for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering ... news for publication."

Assuming that Civil Rights Law §79(h) provides any protection to Respondents herein [and Petitioners strenuously argue that by the statutory definitions of Civil Rights Law § 79(h), it does not] any protection afforded to journalists under this section protects them from being held in contempt only. As the Third Department, Supreme Court of the State of New York, Appellate Division stated, Civil Rights Law § 79(h)

> "is an exception to the general rule which requires disclosure to an authorized government body and must therefore be strictly construed". *Andrews* v. *Andreoli*, 92 Misc.2d 410, 421 (Onondaga Co. 1977) quoting *WBAI-FM* v. *Proskin*, 42 A.D.2d 5, 7 (3rd Dept. 1973).

In the instant action the trial court did not order that Respondents be held in contempt of court, but rather

imposed sanctions permitted by CPLR 3126 for wilful failure to comply with a court order. Under these circumstances, Civil Rights Law § 79(h) is inapplicable.

There is wealth of authority holding that where the newsgatherer is a party defendant in a libel action, he derives no privilege under the freedom of the press provision of the First Amendment to the Constitution or any similar state constitutional provisions against the disclosure of his source. *Newsgather's Non-disclosure Privilege*, 99 ALR 3rd 37 at 74-77 and 112-114, citing *Carey* v. *Hume* (1974) 160 App. DC 365, 492 F2d 631, cert. dismd. 417 U.S. 938; *Brogan* v. *Passaic Daily News*, 22 NJ 139, 123 A2d 473 (1956).

This Court spoke directly to this proposition in *Branzburg* v. *Hayes*, supra at 683 with reference to *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964).

> The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution.

The information sought in the instant case goes to the heart of the Petitioners' libel action. It is an essential element in Petitioners proof of malice and will reveal that Respondents' newspaper had no reliable source, or that their reliance upon this particular source showed reckless disregard for the truth.

Moreover, and most importantly, as noted by the Appellate Division, and by the Court of Appeals without production of the letter in question, Petitioners cannot sue the author of said letter, or even know whether there is an author of said letter. This would work to the great prejudice of Petitioners since under *New York Times* v. *Sullivan*,

376 U.S. 254 (1964) Petitioners may well have a higher burden of proof in proving defamation against the Respondents (a newspaper) than they would against the author of the "Letter to The Editor", presumably an individual or individuals.

The Court of Appeals in affirming the decision of the Appellate Division which reversed the trial court has by judicial fiat, changed the language and meaning of Civil Rights Law §79(h) as duly enacted by the Legislature. The decision of the Court of Appeals has broadened Civil Rights Law §79(h) without regard to its clear language.

At least twenty-six states have statutes which in some way protect reporters' sources. (*See generally*, Sack, Robert D., *Libel, Slander and Related Problems*, Practising Law Institute, 1980. The broadest of these statutes grant reporters an absolute privilege against disclosing the source of any information that he or she procured or obtained in the course of his or her employment. (see (i.e.)) Ariz.Rev.Stat. §12-2237 (West Supp. 1977), "a person engaged in ... reportorial work shall not be compelled to testify or disclose in a legal proceeding ... the source of information procured. ..." The New York "Shield Law," Civil Rights Law § 79-h, is a variation on this "absolute privilege", since, by its very language it only prohibits holding a reporter in contempt for refusing to disclose such information. The statute does not, by its own language, insulate reporters from sanctions other than contempt and thus such language cannot and should not be read into it. "Words and phrases used in a statute should be given their ordinary meaning when ... the Legislature has given no indication that a different meaning was intended." (*People* v. *Cruz*, 48 N.Y.2d 419, 428 (1979); *People* v. *Iannaccone*, 112 Misc.2d 1057, 1060 (1st Dept. 1982). In the instant action moreover the defendants are not reporters nor was the "letter to the editor" acquired in the course of gathering the news (See Point I(B) at pages 19-21).

As former Governor Rockefeller stated on approving L.1970, C.615 the "Freedom of Information Bill for Newsmen" (now Civil Rights Law §79(h)

> *"The bill protects journalists and news casters from charges of contempt,"...*
>
> * * *
>
> "The threat to a newsman of being charged with contempt and of being imprisoned for failing to disclose his information or its sources can significantly reduce his ability to gather vital information." (emphasis added) (McKinney's 1970 Session Laws of New York, p.3112).

* * *

Further in a Memorandum of Law to Governor Carey dated July 8, 1981 (see Appendix annexed hereto) regarding the 1981 amendments to the "Shield Law", Attorney General Abrams stated that:

> "The bill would expand the journalists' privilege but *not create an absolute privilege.*" (emphasis added)

The order of the Court of Appeals completely ignores the language and history of the statute and instead invoked a "weighing [of the] competing values at issue."

The only authority cited by the Court of Appeals as precedent of any kind is *Feingold* v. *Walworth Bros., Inc.*, 238 N.Y. 446, a case totally distinguishable from the case at bar. *Feingold* concerned the appropriate remedy for the failure to produce books and records in regard to the valuation of corporate stock. Here clearly the Court's remedy would be to limit their defense as to the valuation which went to the issue of damages, not to the issue of liability itself. Accordingly the Court therein did not strike the defendant's answer but choose a more suitable remedy. In the instant case no such suitable remedy is possible nor even properly suggested by the Court of Appeals.

Civil Rights Law §79(h) cannot be subjected to a judicial "weighing" process. It is a duly enacted statute which has been amended twice since its original enactment in 1970. At no time since the enactment of Civil Rights Law §79(h) has the statute claimed anything more or less for newsmen than to protect them from being "adjudged in contempt." It is obviously this threat of being imprisoned for refusal to disclose certain information that the Legislature meant to remedy in enacting the statute. The meaning cannot be broadened or constricted. The statute must be applied by the courts as it is written. Unlike a common law rule of law there is no room for "weighing" values—the Legislature has weighed the competing values and the statute is the final result.

No other cases were relied upon by the Court of Appeals in supporting its decision herein.

In the instant action this Court should not expand Civil Rights Law § 79(h) which is explicit in its language but rather should reverse the Court of Appeals and affirm the trial court in its determination that the "Shield Law" is inapplicable to this action.

The Court of Appeals in the present instance did not stand by the explicit language of the statute. If the New York State Legislature having passed this statute thirteen years ago and amending it twice since, has not felt the need to expand its language to provide an "absolute privilege" to reporters then neither should the Court of Appeals. Its application of the statute herein should be declared unconstitutional.

2. The "Shield Law" Civil Rights Law § 79(h) By Its Own Definitions Does Not Apply to the "Letter to The Editor" in Issue Here.

It is the contention of Petitioners that the "Shield Law" by its own definition is inapplicable to the anonymous "Letter to The Editor".

Assuming, *arguendo*, that the statute would otherwise be applicable to the case at bar, the circumstances of the instant case foreclose its use by Respondents. The New York Courts have recently described the two essential elements that a party must establish in order to raise the claim of privilege. These elements are (1), that the information must be imparted to the reporter under a cloak of confidentiality; and (2), that the information in question must be obtained in the course of gathering news for publication. *Dack* v. *Beni Broadcasting of Rochester*, 101 Misc.2d 490 at 500-501 (citing *Matter of Wolf* v. *People*, 69 Misc. 2d 256, 261 (N.Y. Co. 1972), *aff'd.* 39 A.D.2d 864 (1st Dept. 1972).

Petitioners strongly assert that this anonymous "Letter to The Editor" is not "news", the author was not a "news source" within the definition of the statute, nor was the required element of confidentiality established.

The instant defamation action deals with a "Letter to The Editor" voluntarily submitted by its author as an expression of opinion. Such an epistle cannot be designated "obtained in the course of gathering news for publication."

In the present action, the anonymous letter writer did not supply Respondents with "news" or "information" but rather with an expression of personal opinion. Such an expression of an individual's opinion cannot be deemed as "obtained in the course of gathering news for publication." *Davis* v. *Davis*, 88 Misc.2d 1 (Rensselaer Co., 1976) is not to the contrary since the letter published in *Davis* was not claimed to be libelous.

As the court stated in *Hennigan* v. *Buffalo Courier Express Company*, 85 A.D.2d 924, 925 (4th Dept. 1981) "The confidential relationship with the source must first be established in order to determine the interest to be balanced against that of the civil litigant. Full disclosure is the general rule and the burden of showing immunity from

disclosure is on the party asserting it (*Koump* v. *Smith*, 25 N.Y.2d 287, 294; *Maid Maintenance Serv.* v. *General Acc. Fire & Life Assur. Corp.*, 56 A.D.2d 134, 135)." *See People* v *Korkala*, Supreme Court, New York County, New York Law Journal, September 19, 1983, p.16, col.1 at col.4 ("Both the legislative history of this statute and the relevant judicial authorities confirm that the protection of the shield law rests on confidentiality") In the instant action, no "confidential relationship" has ever been established. In fact in response to the original Order to Show Cause before Justice DeLuca confidentiality was not even remotely alleged. It was not until October 2, 1981, a month after this litigation was begun and after Justice DeLuca had issued his first order that Respondents first claimed that a confidential relationship existed with the letter writer. Moreover, even at that time and to the present, no details have been given, no reason has been given for the long delay in asserting this alleged privilege, nor have Respondents been subjected to cross examination of any kind. Under these circumstances Respondents have not met their burden of showing the existence of any "confidential relationship."

3. The Sanctions Imposed by the Court Below Were Appropriate Since Respondents Wilfully Violated an Order For Pre-Trial Discovery Crucial to Petitioners Cause of Action.

The original Order compelling production of the offending "Letter to The Editor" was dated October 6, 1981, and was served upon the Respondents with notice of entry on October 20, 1981. The Order adhering to the October 6, 1981 Order after reargument was served with notice of entry on October 30, 1981. These Orders designated November 2, 1981 as the date the letter was to be produced. Despite a demand for the letter on that date, and the continuing demands thereafter, the letter was never produced. In view of the wilful refusal to comply with the Order of the lower

court, and the neglect of Respondents to apply for a stay, it is clear that the only sanction that remained was for the lower Court to strike the Respondents' answer, which the lower Court did conditionally—giving Respondents a final chance to comply.

The wilful nature of the disobedience of the lower Court's Order is admitted in the affidavit of Respondent Edward Wolfe submitted in support of defendants' cross motion. Mr. Wolfe stated, "I do not feel that I must comply with said Order and instead I have asserted my rights under the so-called 'Shield Law', which prohibits a court from adjudging me in contempt for my actions".

As Justice DeLuca's order of October 29, 1981 observed, the "Shield Law" does not allow defendant to resist Court Ordered discovery. Nor does this law give a defendant the right to disregard the Orders of the Courts. It shields Respondent, if in fact it applies, *only* from the contempt sanction, not from CPLR §3126 sanctions.

The law of this case is clear. The lower Court ordered the production of the "Letter to The Editor" having determined that Petitioners were entitled to such discovery. Respondents cannot dictate to the Petitioners, and more importantly to the Court, the manner in which this action is to be tried or presented.

The remedy of conditionally striking Respondents' pleadings is entirely proper as their conduct in knowingly and wilfully refusing to comply with the lower court's Orders of disclosure clearly indicates, as have the Respondents in their affidavit, that they have no intention of ever complying. *In Re Estate of Porter*, 64 Misc.2d 1016 (Sur.Ct. N.Y. Co. 1970); *Katz* v. *Travelers Indem. Co.*, 39 A.D.2d 516 (1st Dept. 1972); *Electorque Associates, Inc.* v. *Arverne Houses, Inc.*, 73 A.D.2d 682 (2d Dept. 1979).

Moreover, the Respondents' refusal to comply with the lower court's orders is part of a wilful and knowing

strategy to defeat the rights of the Petitioners and a contumacious and wilful failure to obey the directives of the Courts. *Katz* v. *Katz*, 68 A.D.2d 536 (2d Dept. 1979); *Rodriguez* v. *Sklar*, 56 A.D.2d 537 (1st Dept. 1977). The facts sought to be disclosed have a direct bearing on the outcome of this action and accordingly, the wilful and contumacious refusal of discovery should result in striking the pleadings of the defendants. *Rosenberg* v. *Trachtman*, 103 Misc.2d 472 (Queens Co. 1980). *Bycel* v. *Freeman*, 95 Misc.2d 270 (Nassau Co. 1978).

Thus it is clear that the remedy of CPLR §3126 is appropriate in this case.

CPLR §3126 clearly states in pertinent part that:

> "If any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to be disclosed, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> 1. . . . . .
>
> 2. . . . . .
>
> 3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action . . . against the disobedient party."

Having willfully failed to obey a court order without making any effort to obtain a stay of said order, Respondents then had the temerity to argue that the penalty of CPLR §3126(3) as imposed by the lower court was too severe.

The first argument set forth by Respondents against the sanction of CPLR §3126(3) was what Respondents refer to as "constitutional overtones" citing *Feingold* v. *Walworth Bros., Inc.*, 238 N.Y. 446 (1924) and *People* v. *Henriques & Co., Inc.*, 267 N.Y. 398 (1935).

A reading of those cases, however, shows that they

merely bolster Petitioners position herein. In *Feingold* the Court of Appeals stated that it was "well established" that the court in a proper case could "strike out an answer as punishment for disobedience of the order of discovery without depriving a Defendant of his property without due process of law." (238 N.Y. at 451) A proper case according to the court would be one concerning "suppression of material evidence" within Defendant's possession (238 N.Y. at 452). In *Feingold* the court found that the proper punishment for withholding proof could be limited to excluding what the proof presumptively establishes.

In the present action, such an exclusion of proof would not be an adequate remedy since Respondents are withholding the name of a party or parties against whom Petitioners have a meritorious cause of action and conceivably a lesser burden of proof and whose testimony and/or knowledge of their identity is necessary to meet the burdens of proof in the instant action.

In the instant action nothing less than a complete striking of Respondents' pleadings will be an adequate remedy.

Failure to disclose is not collateral to the merits of the case but strikes to the very heart of it. It is completely insufficient for the Court of Appeals to state that Respondents will not be able to rely on investigation or reporting by the anonymous letter writer. It is not merely the letter writer's state of mind and decision making processes which are in question here but the state of mind of the publishers of Respondent *Babylon Beacon*. Petitioners are entitled to discovery and can only adequately discover after the Court of Appeals is reversed and lower court's orders are complied with. Additionally Respondents are depriving Petitioners of obtaining the identity of additional defendants in this action. While hiding behind a high standard of proof Respondents are additionally preventing Petitioners from suing the originator of the defamatory letter which

was published *in toto* in Respondents' newspaper, if in fact there is any letter writer at all.

The Court of Appeals has applied Civil Rights Law §79(h) as if the Legislature had created a complete "privilege". However, Civil Rights Law §79(h) does not create an absolute privilege. (Compare CPLR Rules §§4502, 4503, 4504, 4505 which create true "privileges"). A comparison with the sections of the CPLR which create true privileges shows that in enacting Civil Rights Law §79(h) the Legislature was concerned with preventing contempt, and only contempt, from being used as a sanction against newsmen. Respondents would force this Court and the New York State Court of Appeals has granted them an absolute privilege that the New York State Legislature has not recognized nor enacted into law.

CONCLUSION

For the foregoing reasons the within Petition should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

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2 No. 76

OAK BEACH INN CORP., *et al.*,

Appellants,

v.

BABYLON BEACON, INC., d/b/a
BABYLON BEACON NEWSPAPER, *et al.*,

Respondents.

PATRICK K. BROSNAHAN, JR. &
PATRICIA S. MUHLRAD
Babylon,
for appellant.

BARTHOLOMEW J. REBORE,
Lindenhurst,
for respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

WACHTLER, J.

The question on this appeal is whether a newspaper, which has been sued for publishing an allegedly libelous letter to the editor, can be precluded from answering the complaint or making any defense to the suit if it refuses to disclose to the plaintiff the name of the person who wrote the letter. The trial court found the sanction appropriate for refusal to comply with its order directing the newspaper to satisfy plaintiff's demand for disclosure of the letter writer's identity. The Appellate Division reversed relying

on section 79-h of the Civil Rights Law, popularly known as the Shield Law, which grants a journalist an exemption from being "adjudged in contempt" for refusing or failing to disclose the "source" of any particular news item. The Appellate Division also granted the plaintiffs leave to appeal to this court on a certified question as to the correctness of its order.

The Babylon Beacon is a weekly newspaper published on Long Island. Robert Matherson is the owner of the Oak Beach Inn which is also located on Long Island. In March of 1981 Matherson ran a paid advertisement in the paper in which he criticized local officials for failing to take action to protect the public from a dangerous curve on Montauk Highway. The advertisement was captioned "Let's Stop The Slaughter On Our Highways". On April 9, 1981 the newspaper published a letter to the editor accusing Matherson of contributing to the problem and otherwise endangering the public safety in his management of the Oak Beach Inn. The letter alleged, for example, that obviously intoxicated persons were served alcoholic beverages at the Inn, that fire code violations were reported, and that the Inn and the adjacent parking lot were permitted to become dangerously overcrowded. This letter was printed under the caption "Hypocricy Cited In O.B.I. Advertisement". At the end of the letter the paper noted that the writer's name had been "withheld upon request".

In September of 1981 the plaintiffs commenced a libel action against the newspaper, its owner, and various members of the staff, claiming that the letter contained false statements which had been maliciously published by the defendants. Simultaneously the plaintiffs served a show cause order demanding that the defendants be compelled "pursuant to CPLR Sec. 3102(c)" to disclose "the name and last known address of the writer or writers" of the letter to the editor. In an affidavit attached to the show cause order plaintiffs contended that "knowledge of this

matter is necessary in order for the plaintiffs to determine who to sue, pursuant to CPLR 3102(c)". The defendants opposed the application claiming that the motion for disclosure was premature because issue had not been joined. The defendants also contended that the demand for disclosure raised "serious constitutional questions of speech and freedom of the press". In reply plaintiffs observed that "CPLR 3102(c) permits an examination prior to commencement of an action for the purpose of identifying prospective defendants to plaintiffs' contemplated suit". The court granted the plaintiffs' motion and directed defgendants t furnish a copy of the letter to the plaintiffs.

The defendants then moved for reargument. They stated that it is the policy of the newspaper to require those who submit letters to the editor to provide their names, addresses and telephone numbers, if they wish the letters to be published. Defendants noted, however, that it was also the policy of the paper to print letters anonymously when, as in this case, the letter writer so requests. They argued that compelling disclosure of the letter writer's identity under these circumstances would infringe on the defendants' first amendment rights and would also violate section 79-h of the Civil Rights Law of this State. The court granted reargument but adhered to its original decision stating: "Civil Rights Law § 79-h, from a plain reading of its terms, does not prevent disclosure. What it does is eliminate contempt as a remedy for failure to comply with court-ordered disclosure (see CPLR R.3124). Contempt aside, there are other remedies available (see CPLR 3126)".

When the defendants still refused to disclose the name of the letter writer, the plaintiffs moved to have them held in contempt for disobeying the court's order which: "thereby deprived [plaintiffs] of their cause of action against the author of said letter". This however was only requested "in the alternative". The primary relief requested was an order, pursuant to CPLR 3126, striking the defendants'

answer and directing the entry of a default judgment against the defendants on the libel complaint. In support of their contention that this remedy was appropriate, the plaintiffs now urged that: "the information sought goes to the heart of the plaintiffs' libel action. It is an essential element in plaintiffs' proof of malice; and may conceivably reveal that defendant newspaper had no reliable source, or that his reliance upon this particular source showed a reckless disregard of the truth". In response to this latter contention the defendants urged that there "was no need for the drastic remedy" of striking their answer because the defendants did not intend to make "affirmative use" of the anonymous letter writer in defending against the complaint. They stated that they intended to defend the suit completely on the basis of their own actions, "without relying on any of the investigation or underlying material that the source may or may not have used".

The court held that the remedy of contempt is barred by section 79-h of the Civil Rights Law. The court also held, however, that the Shield Law "in no way inhibits the other remedies" specified in CPLR 3126, "which may be imposed upon a party for refusal to comply with an order directing disclosure". Relying on CPLR 3126, subd 3, the court ordered that the defendants' answer be stricken and that the plaintiffs be permitted to move for summary judgment, or other appropriate relief, unless the defendants made the letter available for inspection within 15 days.

The Appellate Division granted a stay and then reversed. The appellate court noted that privleged material was exempt from discovery under CPLR 3101 subd(b) and concluded that § 79-h of the Civil Rights Law established such a privilege for journalists with respect to their sources. The court observed that the latter statute only speaks in terms of shielding the journalist from contempt, but held that it "would be unduly restricted if journalists invoking the privilege were subjected to large monetary judgments in civil actions upon their refusal to reveal news

sources simply because a contempt proceeding was not involved". The court also held that a letter to the editor qualifies as "news" within the meaning of the statute.

Although we agree with the Appellate Division that the order of the trial court should be set aside, we do so for different reasons.

The Shield Law was adopted in 1970 as section 79-h of the Civil Rights Law (L 1970, ch 615, § 1). The sponsor of the bill stated that it was intended to protect "newsmen from being held in contempt for refusing to disclose their news sources before a court inquiry, legislative hearing or any other body having contempt powers" and had been prompted by recent efforts made by Federal authorities to subpoena journalists in order to obtain evidence which could later be used in criminal prosecutions (see N.Y. Legislative Annual, 1970, p 33-34). When the Governor signed the bill he also noted that it "protects newscasters from charges of contempt" and observed that the "threat to a newsman of being charged with contempt and of being imprisoned for failure to disclose his informatin or its sources can significantly reduce his ability to gather vital information" by cutting off "valuable sources of information" (see N.Y. Legislative Annual 1970, p 508).

By its terms the statute expressly provides for "Exemption of professional journalists and newscasters from contempt" (Civil Rights Law sectin 79-h, subd [b]). Subsequent amendments have clarified and broadened the statute in some respects (see L 1975, ch 316, § 1; L 1981, ch 468 §§ 1-3). However, the Legislature has never established an absolute right or granted journalists complete immunity from all legal consequences of refusing to disclose evidence relating to a news source. At the time of these proceedings the relevant portion of the statute provided that "no professional journalist or newscaster ... shall be adjudged in contempt by any court, the legislature or other body have contempt powers, nor shall a grand jury seek to have a

journalist or newscaster held in contempt by any court, legislature or other legislative body having contempt powers for refusing or failing to disclose any news or the source of any such news . . ." (Civil Rights Law § 79-h, subd [b]).

Contempt is the traditional remedy employed by public bodies against those who have refused to comply with orders to testify or disclose information. It usually involves imprisonment, a fine or both (see, e.g., CPLR 2308; Judiciary Law § 753). It is considered a drastic measure (see, Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C3126.4) and often is defined and prosecuted as a criminal offense (see, Penal Law §§ 215.50,215.60,215.65; Judiciary Law § 750[a],3,5,7). The sanctions authorized by CPLR 3126 and its predecessors were designed to provide a court with alternative, less drastic, means to enforce disclosure in civil cases (see, *Feingold* v *Walworth Bros.*, 238 NY 46; Siegal, op cit, C3125.4). A person against whom these sanctions are properly employed cannot be said to have been held or adjudged in contempt (see, *Feingold* v *Walworth Bros.*, *supra*). Indeed contempt is not a penalty enumerated in CPLR 3126 and a court must resort to other more general provisions of the law in the rate instances where it may be necessary to hold a person in contempt for failure to make disclosure in a civil case (see, Siegal, op cit, C3126.1, C3126.3, C3126.4).

The Shield Law's unqualified immunity from contempt granted to journalists who refuse to disclose their sources, would preclude a court from employing that remedy against such a journalist in a civil case, even in those rare instances where it might otherwise be considered the only appropriate or effective remedy. However, the statutory "exemption . . . from contempt" cannot be fairly read to include general exemption from the sanctions authorized by CPLR 3126, most of which function to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof during the

pending civil action.

Of course, if fully utilized some of those sanctions, such as the power of the court to strike pleadings (CPLR 3126, subd 3) may be only theoretically less drastic than contempt in a particular case. A newspaper involved in a substantial libel action may well find the threat of contempt less intimidating than the thought of being entirely stripped of its defenses if it continues to preserve the confidentiality of its source. This type of pratical consideration should be taken into account whenever CPLR 3126 is invoked against a newspaper or journalist for failure to disclose a source in a civil case. The consequences of nondisclosure imposed pursuant to the CPLR should not create new obstacles to newsgathering or undermine the strong legislative policy expressed in the Shield Law. The general rule, that the demanding party should not be granted more relief for nondisclosure than is reasonably necessary to protect legitimate interests (*Feingold* v *Walworth Bros., supra*), should be applied with special force in cases involving nondisclosure of sources by newspapers and journalists.

In this case there was no need for the court to strike the defendants' answer and thus subject them to a default or summary judgment on the libel complaint. To the extent, as the plaintiffs belatedly contend, the defendants' refusal to identify the letter writer may deprive them of evidence relevant to the issue of malice, other remedies are available. CPLR broadly permits a court to make such orders "as are just" including an order prohibiting the noncomplying party from "supporting or opposing designated claims", or introducing evidence on a particular point (subd 2). Relief of this nature should adequately protect the plaintiffs' interests without intolerably burdening the newspaper. Indeed, as indicated, the publication agreed to accept such a limitation in defense of the suit by stating its willingness to defend that allegation of malice by relying on proof of its own independent investigation, without placing any reliance on its source. The court should have limited its order

accordingly.* A newspaper should not be required to accept substantial financial loss as the price for continuing to honor a commitment to maintain the confidentiality of one of its sources.

To the extent the plaintiffs demand disclosure of the letter writer's identity in order to commence a suit against the author, which was the original basis for the demand, the sanctions authorized by CPLR 3126 are not available. that request has no bearing on the plintiffs' action against these defendants. In fact the information was not requested by notice or stipulation pursuant to CPLR 3102 subd (b) which prescribes the "normal method" for disclosure between parties to a pending suit. It was sought pursuant to CPLR 3102 subd (c) which provides for disclosure "[b]efore an action is commenced . . . to aid in bringing an action" by, for instance, supplying the name of a potential defendant (see, Siegel, Practice Commentaries, McKinney's Cons. Laws, Vol 7B, CPLR C3102,C3102.4). This permits disclosure between persons who are not parties to a suit for which the evidence is requested when, as here, a court order is obtained (CPLR 3102, subd c). Against a nonparty the appropriate and only effective remedy generally is contempt (Siegel, op cit, C3126.1; First Reprt, Leg. Doc. [1957] No. 6[b], p 160). The alternative sanctions available under CPLR 3126 apply exclusively to "a party, or a person who at the time a deposition is taken or an examination or inspection is made, is an officer,

*That does not mean, as the dissent states, that the defendants "may control the course of plaintiffs' lawsuit by dictating what plaintiffs may discover". We simply note that the concession made by the defendants in this case appears to provide reasonable protection to the plaintiffs, who have not contended otherwise or proposed any alternative sanction which would more adequately assist them in pursuing their suit without knowledge of the source's identify. The plaintiffs have simply taken the position that any failure on the part of the defendants to make full disclosure of every item "reasonably" demanded, should entitle the plaintiffs to obtain a default judgment.

director, member, employee or agent of a party or otherwise under a party's control" (see, also, Siegel, op cit, C3126.4).

Holding the defendants in contempt for failure to supply the information necessary to commence a suit against the letter writer is prohibited by the Shield Law. Use of alternative sanctions pursuant to CPLR 3126 should also be precluded, not only because the plaintiffs treated these defendants as nonparties when they obtained the discovery order to aid the contemplated suit, but because the basic policy of the Shield Law would be undermined if CPLR 3126 were not strictly read to accord journalists that status under these circumstances. As indicated above, the theory behind the Shield Law is that many valuable sources of news will be lost if journalists can be compelled on threat of contempt to reveal their sources in public forums, thus exposing them to legal, and possibly illegal, risks. This policy would be subverted if the alternatives to contempt authorized by CPLR 3126 could be invoked solely to coerce a newspaper into exposing its source to a potential civil suit for damages.

Accordingly, the order of the Appellate Division should be affirmed.

JASEN, J. (dissenting):

Although the majority concedes, as it must, that the sole purpose of the Shield Law is to protect journalists from charges of contempt and that this statutory " 'exemption * * * from contempt' cannot be fairly read to include general exemption from the sanctions authorized by CPLR 3126", it, nevertheless, refuses to enforce the trial court's disclosure order or to affirm that court's order conditionally striking defendants' answer unless defendants disclose to plaintiffs the identity of the letter writer. Because I do not believe the trial court abused its discretion in imposing a sanction specifically authorized by CPLR 3126(3), I respectfully dissent and vote to reverse the order of the Appellate

Division.

Preliminarily, I note my complete agreement with the majority that section 79-h of the Civil Rights Law was enacted solely to protect journalists from being held in contempt for refusing to disclose the source of any particular news item. (New York Legislative Annual, 1970, pp 33-34, 508.) I also agree that "the Legislature has never established an absolute right or granted journalists complete immunity from all legal consequences of refusing to disclose evidence relating to a news source" (slip op. p 6) and that the Shield Law "cannot be fairly read to include general exemption from the sanctions authorized by CPLR 3126" (slip op, p 7). Thus, the majority today correctly eschews reliance upon the reasoning of the Appellate Division. Indeed, to hold otherwise would be to engage in a flagrant exercise of judicial legislation whereby journalists would be cloaked with absolute immunity from having to disclose the source of news reports. While it may be that such a law is desirable, the fact remains that the Legislature, which in our scheme of separation of powers is the body charged with making such determinations, has decided otherwise.

Notwithstanding the clear intent of the Shield Law not to exempt journalists from the sanctions authorized by CPLR 3126, the majority affirms the order of the Appellate Division upon the ground that the sanction imposed by the trial court—striking defendants' answer—was unnecessary because the defendants agreed "to defend th[e] allegation of malice by relying on proof of its own independent investigation, without placing any reliance on its source." it is with this reasoning, offered without supporting authority, that I cannot agree.

In seeking enforcement of the court's disclosure order, plaintiffs asserted that "the information sought goes to the heart of the plaintiffs' libel action. It is an essential element in plaintiffs' proof of malice; and may conceivably reveal

that defendant newspaper had no reliable source, or that [its] reliance upon this particular source showed a reckless disregard for the truth." Although the importance to plaintiffs of learning the author's identity could not then and cannot now be seriously disputed, the disobedient defendants blithely replied that there was "no need" to strike the answer because they did not intend to make "affirmative use" of the anonymous author's name in defending the action. However, defendants' novel suggestion that they may control the course of plaintiffs' lawsuit by dictating what plaintiffs may discover, simply by stating that they do not intend to rely on certain information which is of great importance to plaintiffs' case, in preparing their defense and thereby preclude plaintiffs from obtaining that information, is outrageous. Not only is such a rule grossly unfair to the innocent plaintiffs here, but it also ignores well-settled principles governing discovery procedures and distorts the adversarial process.

CPLR 310(a) makes clear what information may be obtained by parties to a lawsuit: "There shall be *full* disclosure of *all* evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof." (Emphasis supplied.) We have consistently construed the discovery provisions of the CPLR liberally "to require disclosure 'of any facts bearing on the controversy which will assist [parties'] preparation for trial." (*Cynthia B.* v *New Rochelle Hospital Medical Center*, 60 NY2d 452, 461, quoting from *Allen* v *Crowell-Collier Pub. Co.*, 21 NY2d 403, 406.) There can be no doubt that the identity of the letter writer in the case before us is relevant to the issue of malice. Indeed, plaintiffs' ability to satisfy the standard set forth in *New York Times Co.* v *Sullivan* (376 US 254) by proving that defendants acted with actual malice in publishing the letter may well turn upon their

learning the identity and, insofar as known, the motivation of the author.[1]

Inasmuch as the information sought is relevant to the subject controversy and will assist plaintiffs in preparing for trial, it is discoverable pursuant to CPLR 3101(a) and, as the majority concedes, the trial court correctly ordered disclosure. Thus, by wrongfully refusing to comply with the disclosure order the defendants subjected themselves to the penalties set forth in CPLR 3126 even though, by virtue of the Shield Law, they could not be held in contempt. The majority concedes this fact as well.

My departure from the majority, therefore, concerns the proper sanction to be imposed upon defendants for wrongfully refusing to comply with the court's disclosure order. While we all agree that first and foremost the sanction imposed upon the disobedient defendants must adequately protect the plaintiffs' interests (*Feingold* v *Walworth Bros.*, 238 NY 446), the majority, without holding that the trial court abused its discretion in striking defendants' answer pursuant to CPLR 3126(3), believes a different remedy, presumably less drastic, should have been imposed pursuant to CPLR 3126. However, a brief glimpse at the alternative sanction which the majority would impose—precluding

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[1] By way of illustration, consider the following hypothetical situation: the anonymous letter writer was a reporter for the defendant newspaper who harbored a widely known personal animosity toward toward the proprietors of the Oak Beach Inn and who had publicly declared long ago that he would some day make trouble for plaintiffs. Clearly, the letter writer's identity would be relevant and extremely important to plaintiffs in helping them to prove that defendants acted with malice or in reckless disregard for the truth in publishing the allegedly defamatory letter. However, under the majority's reasoning, plaintiff would never learn the author's identity simply because defendants wrongfully refused to disclose it. Worse yet, the trial court would be powerless to order the defendants' answer stricken pursuant to CPLR 3126(3) because defendants promised not to make "affirmative use" of the author's identity in preparing their defense. Such a rule finds no support in the statutes, case law or logic.

defendants from "supporting or opposing designated claims" or "introducing evidence on a particular point" (CPLR 3126[2]) (slip op, p 8)—reveals that it is no sanction at all and does nothing to protect plaintiffs' interests in obtaining lawfully discoverable information such as the indentity of the letter writer.

The majority would allow defendants to defy the lawful disclosure order and to deprive plaintiffs of important discoverable information simply because defendants promised not to use the information in preparing their defense. Furthermore, the sanction to majority favors would be meaningless because there would be no need for defendants to introduce evidence on the issue of malice if plaintiffs were prevented from obtaining information—the letter writer's identity—essential to the preparation of their case. Indeed, depriving plaintiffs of the information they seek and which this court agrees is discoverable will effectively sound the death knell for plaintiffs' lawsuit. It is not surprising, therefore, that defendants themselves suggested such a sanction as an alternative to disclosure, for to allow this would be to effectively preclude a plaintiff from ever successfully prosecuting a defamation action against journalists. A rule which compels such a result should come from the Legislature, not this court.

To be distinguished from this case is a situation such as that in *Feingold* v *Walworth Bros.* (238 NY 446, *supra*). In that case, plaintiff sought discovery of documents necessary to establish the value of the corporate stock of which he alleged he was defrauded by defendants. Plaintiff claimed it was worth $200,000, while defendants pegged its value at $20,000. Since plaintiff sought the disputed records solely for purposes of proving the stock was worth $200,000, this court held that an order precluding defendants from asserting a claim that the value of the stock was less than $200,000, rather than an order striking defendants' answer,

was the appropriate sanction. The court correctly reasoned that the more limited sanction was adequate to fully protect plaintiff's interest in securing the documents he requested and that a harsher penalty would exceed the court's power to punish defendants for failing to obey an order of disclosure. By sharp contrast, the sanction the majority would impose in the instant case would not begin to protect plaintiffs' interests.

Accordingly, I would reverse the order of the Appellate Division and reinstate the order of Supreme Court.

Order affirmed, with costs. Question certified answered in the affirmative. Opinion by Judge Wachtler in which Chief Judge Cooke and Judges Jones, Meyer, Simons and Kaye concur. Judge Jasen dissents and votes to reverse in an opinion.

Decided May 10, 1984

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

AT A SESSION OF THE COURT,
HELD AT COURT OF APPEALS HALL IN THE CITY OF ALBANY
ON THE SECOND DAY OF JUNE A.D. 1983

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2 Mo. No. 583 SSD 65

OAK BEACH INN CORPORATION AND
ROBERT W. MATHERSON

Appellants,

vs.

BABYLON BEACON, INC., d/b/a
BABYLON BEACON NEWSPAPER, *et al.*,

Respondents.

Present, HON. LAWRENCE H. COOKE, Chief Judge, presiding.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

JOSEPH W. BELLACOSA
Clerk of the Court

APPENDIX C

AT A TERM OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT, HELD IN KINGS COUNTY ON MARCH 7, 1983

No. _____

OAK BEACH INN CORP., *et al.*,

Respondents,

v

BABYLON BEACON, INC., d/b/a
BABYLON BEACON NEWSPAPER, *et al.*,

Appellants.

ORDER ON APPEALS FROM ORDERS

HON. VITO J. TITONE, Justice Presiding, HON. DAVID T. GIBBONS, HON. WILLIAM C. THOMPSON, HON. JAMES F. NEIHOFF, Associate Justices

In the above entitled cause, the above named Babylon Beacon, Inc., d/b/a Babylon Beacon Newspaper et al., defendants, having appealed to this court (1) from so much of an order of the Supreme Court, Suffolk County, dated October 29, 1981, as, upon granting their motion for reargument, adhered to its original determination, dated October 6, 1981, which granted plaintiffs' motion to direct defendants to disclose the author of an anonymously published letter to the editor and to produce a copy of the letter; and (2) from an order of the same court, dated April 26, 1982, which conditionally granted plaintiffs' motion to strike defendants' amended answer unless they complied

with the prior order directing disclosure and production of the letter and "dimissed without prejudice" to renew defendants' cross motion for summary judgment; and the said appeals having been argued by Steven M. Schapiro, Esq., of counsel for the appellants and argued by Patrick Kevin Brosnahan, Esq., of counsel for the respondents, due deliberation having been had thereon; and upon the OPINION PER CURIAM herein and its decision slip heretofore filed and made a part hereof, it is

ORDERED that the order, dated October 29, 1981, insofar as appealed from is hereby unanimously reversed, and, upon reargument, the order, dated October 6, 1981, vacated and the motion to compel disclosure denied, and it is further

ORDERED that the order, dated April 26, 1982, appealed from is hereby unanimously reversed, plaintiffs' motion to strike defendant's answer denied and the matter is hereby remitted to the Supreme Court, Suffolk County, to consider defendants' cross motion for summary judgment, and it is further

ORDERED that the defendants are hereby awarded one bill of $50 costs and disbursements.

Enter:

Clerk of the Appellate Division.

AD2d

3460 E, 3461 E

OAK BEACH INN CORP., *et al.*,

respondents,

v

BABYLON BEACON, INC., d/b/a
BABYLON BEACON NEWSPAPER *et al.*,

appellants.

STEVEN M. SCHAPIRO,
North Lindenhurst, N.Y.,
for appellants.

PATRICK KEVIN BROSNAHAN, JR.,
Babylon, N.Y.
(PATRICIA S. MUHLRAD
of counsel),
for respondents.

VITO J. TITONE, J.P.
DAVID T. GIBBONS
WILLIAM C. THOMPSON
JAMES F. NIEHOFF, JJ.

November 30, 1982

Appeals (1) as limited by the defendants' brief, from so much of an order of the Supreme Court, Suffolk County (De LUCA, J.), dated October 29, 1981, as, upon granting their motion for reargument, adhered to its original determination, dated October 6, 1981, which granted plaintiffs' motion to direct defendants to disclose the author of an anonymously published letter to the editor and to produce a copy of the letter; and (2) from an order of the same court (D'AMARO, J.), dated April 26, 1982, which conditionally granted plaintiffs' motion to strike defendants' amended answer unless they complied with the prior order directing disclo-

sure and production of the letter, and "dismissed without prejudice" to renew defendants' cross motion for summary judgment.

Order dated October 29, 1981, reversed insofar as appealed from, and, upon reargument, order dated October 6, 1981 vacated and motion to compel disclosure denied.

Order dated April 26, 1982, reversed, plaintiffs' motion to strike defendants' answer denied and matter remitted to the Supreme Court, Suffolk County, to consider the defendants' cross motion for summary judgment.

Defendants are awarded one bill of $50 costs and disbursements.

OPINION PER CURIAM.

TITONE, J.P., GIBBONS, THOMPSON and NIEHOFF, JJ., concur.

March 7, 1983

OAK BEACH INN CORP. v BABYLON BEACON INC.

SUPREME COURT: APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

OAK BEACH INN CORP., *et al.*,

Respondents,

—against—

BABYLON BEACON, INC., d/b/a
BABYLON BEACON NEWSPAPER, *et al.*,

Appellants.

TITONE, J.P., GIBBONS, THOMPSON and NIEHOFF, JJ.

March 7, 1983

APPEALS (1) as limited by the defendants' brief, from so much of an order of the Supreme Court, Suffolk County (FRANK P. De LUCA, J.), dated October 29, 1981, as, upon granting their motion for reargument, adhered to its original determination, dated October 6, 1981, which granted plaintiffs' motion to direct defendants to disclose the author of an anonymously published letter to the editor and to produce a copy of the letter; and (2) from an order of the same court (PAUL T. D'AMARO, J.), dated April 26, 1982, which conditionally granted plaintiffs' motion to strike defendants' amended answer unless they complied with the prior order directing disclosure and production of the letter, and "dismissed without prejudice" to renew defendants' cross motion for summary judgment.

STEVEN M. SCHAPIRO,
North Lindenhurst, N.Y.,
for appellants.

PATRICK KEVIN BROSNAHAN, JR.,
Babylon, N.Y.

(PATRICIA S. MUHLRAD
of counsel),
for respondents.

PER CURIAM. Plaintiffs ran an advertisement in the defendant newspaper lamenting the failure of the Suffolk County Police Department to take action to protect the public from a dangerous curve on Montauk Highway. Defendants subsequently published a letter to the editor which accused plaintiffs of creating their own hazardous conditions by, *inter alia*, serving liquor to obviously intoxicated people, violating the fire code, blocking roads, and causing a parking problem. The name of the letter's author was not published. Plaintiffs then commenced the instant defamation action, and thereafter sought discovery to learn the name of the letter writer so that the writer could also be brought into the action as a defendant. Defendants refused to reveal the requested information, claiming protection from this disclosure under section 79-h of the Civil Rights Law (the Shield Law). Defendants' refusal to disclose the name of the letter writer and produce a copy of the letter has resulted in plaintiffs obtaining a conditional order striking defendant's answer. Special Term, in conditionally granting plaintiffs' motion to strike defendants' answer, reasoned that the Shield Law was only applicable in contempt proceedings. We do not agree, and, accordingly, plaintiffs' motion to strike the answer should be denied.

The privilege afforded professional journalists from revealing news or the source of the news coming into their possession during the course of gathering or obtaining news for publication has been applied in the context of defamation actions (*Greenberg* v *CBS, Inc.*, 69 AD2d 693, *Hennigan* v *Buffalo Courier Express, Co., Inc.*, 85 AD2d 924) and motions to quash subpoenas (*Matter of Andrews* v *Andreoli*, 92 Misc 2d 410; *Matter of Wolfe* v *People of the State of New York*, 69 Misc 2d 256, affd 39 AD2d 864). As noted in *Matter of Andrews* v *Andreoli* (*supra*, p 417),

although the Shield Law is cast in negative terms to shield the newsman from contempt, it "conceptually rests on a firm base of confidentiality". The salutary purposes of the Shield Law would be unduly restricted if journalists invoking the privilege were subjected to large monetary judgments in civil actions upon their refusal to reveal news sources simply because a contempt proceeding was not involved. Special Term erred in refusing to consider the potential applicability of the privilege afforded by the Shield Law in this defamation action.

With regard to the merits of the confidentiality claim, the only further serious challenge raised by plaintiffs concerns the question of whether a letter to the editor qualifies as "news". Paragraph (8) of subdivision (a) of section 79-h of the Civil Rights Law defines news as "written * * * communication concerning local * * * events or other matters of public concern or public interest or affecting the public welfare". The letter in issue, concerning allegedly unsafe conditions created by plaintiffs, falls squarely within this language (see *Davis* v *Davis*, 88 Misc 2d 1). Furthermore, many people read the letters to the editor column for the same reasons they read any other news column in the paper—to learn what is happening around them, and the reactions of other people to these events. The beneficial purposes served by the Shield Law would be unnecessarily restricted by removing the letters to the editor column from its aegis. It is in the public interest to hold that this column comes within the purview of "news".

Plaintiffs will now be unable to initiate an action against the author of the letter, but in weighing the competing values at issue, the privilege must prevail (see, generally, *Matter of Langert* v *Tenney*, 5 AD2d 586, mot for lv to app den 6 AD2d 777, app dsmd 5 NY2d 875). This is simply the price that must be paid in a society which seeks to encourage and protect an aggressive and unintimidated press. Plaintiffs can of course still pursue their action against the present defendants. In addition, defendants'

reliance on the shield of confidentiality will result in the imposition of restrictions on their ability to make use of the protected source in defending the action (*Greenberg* v *CBS, INC.*, 69 AD2d 693, *supra*).

Defendants were not required to disclose privileged matter (CPLR 3101, subd. [b]), and it was therefore error to impose sanctions upon them for their refusal to disclose this privileged matter. Accordingly, the orders under review which directed disclosure and conditionally struck their answer must be reversed. Special Term failed to address the merits of defendants' cross motion for summary judgment. Although the order denying the cross motion without prejudice to renew was appealable as of right (see *Samuels* v *Ames Realty Corp.*, 79 AD2d 651; *Sherman* v *Morales*, 50 AD2d 610), the appropriate course is to remit this matter to Special Term to address itself to the merits of the cross motion.

TITONE, J.P., GIBBONS, THOMPSON and NIEHOFF, JJ., concur.

APPENDIX D

AT A TERM OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT, HELD IN KINGS COUNTY ON MARCH 7, 1983.

No._____

OAK BEACH INN CORP., *et al.*,

Respondents,

v.

BABYLON BEACON, INC., *etc.*, *et al.*,

Appellants.

ORDER

HON. MILTON MOLLEN, Presiding Justice. HON. LEON D. LAZER, HON. GUY J. MANGANO, HON. DAVID T. GIBBONS, Associate justices

In the above entitled cause, the appellants having moved to consolidate appeals (presently on the November term calendar) from two orders of the Supreme Court, Suffolk County, dated April 26, 1982 and October 29, 1981; and permit the filing of a single brief on the two appeals;

Now, upon the papers filed in support of the motion and there being no opposition thereto, and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion is hereby granted. The appeals are consolidate and the consolidated appeals shall remain on the November term calendar.

The appellants' time to perfect the consolidated appeals is extended up to and including October 8, 1982; and the respondents' brief must be served and filed on or before October 22, 1982.

Enter: IRVING N. SELKIN
Clerk of Appellate Division

APPENDIX E

SUPREME COURT – STATE OF NEW YORK
TRIAL/SPECIAL TERM, PART SUFFOLK COUNTY

No._____

OAK BEACH INN CORP., *et al.*,

Plaintiffs,

against

BABYLON BEACON, INC., etc., *et al.*,

Defendants.

PATRICK KEVIN BROSNAHAN, JR. ESQ.
73 West Main Street
Babylon, New York 11702
Plaintiff's Attorney

STEVEN M. SCHAPIRO, ESQ.
4180 Sunrise Highway
Massapequa, New York 11758
Defendant's Attorney

Present: HON. FRANK P. DE LUCA, Jurtice

Upon the following papers numbered 1 to 9 read on this motion for leave to reargue. Order to Show Cause and supporting papers 1-5; Answering Affidavits and supporting papers 6-9; it is,

ORDERED that this motion by defendant pursuant to CPLR 2221 for leave to reargue this Court's Order dated October 6, 1981 is granted. Upon reconsideration of the issues raised by the instant motion papers, the Court's original decision is adhered to and the document in question is ordered to be produced as in the Court's Order dated October 6, 1981. i.e. at 10:00 A.M. on November 2, 1981 at

defendant's place of busiress.

Upon reargument, defendant, (who has, after decision on the original motion and the making of this motion, changed attorneys), asserts that Civil Rights Law §79h as well as the First Amendment to the United States Constitution "shield" defendant from the discovery sought herein.

Civil Rights Law §79h, from a plain reading of its terms, does not prevent disclosure. What it does is eliminate contempt as a remedy for failure to comply with court-ordered disclosure. (See CPLR r.3124). Contempt aside, there are other remedies available. (See CPLR §3126).

Since an application to punish defendant for contempt in failing to obey court-ordered disclosure is not before the Court, the so-called "shield law," Civil Rights Law §79h is inapplicable as a bar to discovery.

As to the First Amendment, the Court finds no case construing the Amendment so as to prohibit pre-trial disclosure in a defamation action against the press.

Plaintiff's application to have defendant's attorney discharged based upon a conflict of interest is denied. The Court finds no bona fide grounds, but mere speculation, to support the requested relief.

APPENDIX F

SUPREME COURT – STATE OF NEW YORK
SPECIAL TERM, PART I SUFFOLK COUNTY

No. 465

OAK BEACH INN CORP., AND ROBERT W. MATHERSON, *et al.*,
Plaintiffs,

against

BABYLON BEACON, INC., D/B/A BABYLON BEACON NEWSPAPER,
EDWARD D. WOLFE AND JANE D. WOLFE
AND JOHN AND/OR JANE DOE, ETC.
Defendants.

PATRICK KEVIN BROSNAHAN, JR. ESQ.
73 West Main Street
Babylon, New York 11702
Plaintiff's Attorney

STEVEN M. SCHAPIRO, ESQ.
4180 Sunrise Highway
Massapequa, New York 11758
Defendant's Attorney

Present: HON. PAUL T. D'AMARO, Justice

Upon the following papers numbered 1 to 30 read on this motion and cross-motion/Order to Show Cause and supporting papers 1-13; Notice of Cross Motion and supporting papers 14-26; Answering Affidavits and supporting papers 27-30; Replying Affidavits and supporting papers 31; Other memoranda; (and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that this motion by the plaintiffs and the cross-motion by defendants be, and hereby is, determined as indicated below.

This is an action for defamation in which plaintiffs allege that they have been libelled by an anonymous letter published in the "Letters to the Editor" column of the defendant newspaper by the defendants.

By order dated October 6, 1981 (De Luca, J.), the Court, on plaintiff's motion for discovery, specifically directed the named defendants to permit the plaintiffs to obtain a copy of the letter in question on November 2, 1981 at defendants' place of business.

Thereafter, defendants moved for reargument which came to be heard by Justic DeLuca on October 28, 1981. Upon reargument, the Court considered and rejected defendants contentions that the letter was "shielded" from discovery by Civil Rights Law §79h and the First Amendment of the United States Constitution. As the Court then pointed out the Civil Rights Law §79h protects or shields professional journalists or newscasters from being adjudged in contempt by any court for failing or refusing to disclose any news or news source; and it in no way inhibits the other remedies available against a party for failure to disclose. As the Court said in its October 29, 1981 decision, "... the so-called 'shield law,' Civil Rights Law §79h is inapplicable as a bar to discovery." Nor, the Court ruled, did the First Amendment prohibit pre-trial disclosure.

The foregoing orders of Justice DeLuca have not been reversed or set aside by any higher tribunal. Nevertheless, the defendants have refused to comply with the orders for disclosure; and plaintiffs now move for inter alia, the remedies available to a party where another has refused to comply with an order for disclosure. (See: CPLR §3126) or in the alternative, plaintiffs seek to have the defendants punished for contempt by reason of their refusal to comply with Justice DeLuca's prior orders.

The obvious need for the orderly administration of justice has given rise to the doctrine that one Judge of coordinate jurisdiction should not vacate, modify, or depart

from a ruling or order made by another Judge of coordinate rank in the same case. This principle of law is firmly embedded in our jurisprudence. *Laura v. Laura*, 77 AD 2d 523, 430 NYS 2d 1 (1980); *People v. Romney*, 77 AD 2d 482, 433 NYS 2d 941 (1980); *Lopato v. Kinney Rent-A-Car Inc.*, 73 AD 2d 565, 423 NYS 2d 42 (1979); *Public Service Mut. Ins. Co. Inc. v. McGrath*, 56 AD 2d 812, 392 NYS 2d 659 (1977); *L.K. Comstock & Co. Inc. v. Duffy*, 43 AD 2d 704, 350 NYS 2d 350 (1973); *Carmody-Wait 2d*, Motions & Orders, §8:117, p. 113; Siegel, *New York Practice*, 1978, Ch. 17, §443.

While there are some authorities that suggest that an order directing discovery and inspection is nonappealable, the Appellate Courts of the First and Second Department have held to the contrary. See: *Battaglis v. New York City transit Authority*, 2 AD 2d 985, 157 NYS 2d 797 (2nd Dept., 1956). *Kaplan v. Kaplan*, 13 AD 2d 995, 216 NYS 2d 502 (2nd Dept., 1961); *Schoemer v. Tuchman*, 37 AD 2d 543, 322 NYS 2d 365 (1st Dept., 1971).

The defendants have now twice litigated the question of discovery and inspection before a Justice of this Court, and received from their point of view unfavorable rulings. They have not, to this Court's knowledge, exercised their right to appeal. The defendants herein are now bound by the earlier rulings of Justice DeLuca, and this Court lacks the authority to set aside, modify or vacate those rulings, even if the Court were inclined to do so, which it is not.

The remedy of contempt is of course barred by the Civil Rights Law §79h, and insofar as plaintiffs move for such relief, the motion is denied. but as indicated by the earlier rulings of this Court, plaintiffs are not now, of course, without a remedy. Section 3126 of the CPLR specifies the penalties which may be imposed upon a party for refusal to comply with an order directing disclosure. The most appropriate sanctions in this case are found under CPLR §3126 subd. 3 which authorizes the issuance of

> "an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

Plaintiffs, naturally, seek an order striking defendants' answer and granting plaintiffs judgment.

There is substantial authority for dismissing the pleadings of a party for refusal to obey a court order for disclosure. *Laverne v. Village of Laurel Hollow*, 18 NY 2d 635, 272 NYS 2d 780 (1966), app. dism'd 386 US 682, 87 S. Ct. 1324 (1967); *Norgen v. Columbia Broadcasting Sys. Inc.* 40 AD 2d 143, 383 NYS 2d 262 (1972). Though there is no doubt that defendants' refusal is wilful, this Court is not unmindful of the fact that the refusal is predicated upon their misunderstanding nature and the extent of protection afforded professional journalists by Civil Right Law §79h. Accordingly, as hereinafter indicated the sanctions will be imposed conditionally. Those sanctions shall include a striking of defendants' answer and a stay of any further proceedings by the defendants unless and until they comply with the prior orders of Justice DeLuca.

Based upon the foregoing, it is

ORDERED that pursuant to CPLR §3126, subd. 3, that the defendants' answer is hereby struck unless the defendants provide at their place of business, during its normal business hours, on its usual business days, the plaintiff and/or plaintiff's attorney with the opportunity to discover and inspect the letter in question, in toto, within fifteen (15) days of service of a copy of this order with notice of entry; it is further

ORDERED that pursuant to CPLR §3126, subd. 3, that each defendant is hereby stayed from any further proceedings in this action until there has been compliance by said defendants with the orders of the Court directing disclosure;

and in view of the imposition of such sanction, it is further

ORDERED that defendants' cross-motion for summary judgment is dismissed without prejudice; and it is further

ORDERED that upon defendant's failure to furnish the letter in question for discovery and inspection as specified herein, the order striking plaintiffs' answer and staying defendants from any further proceeding in this action shall be final and plaintiffs may move for summary judgment or any other relief it deems appropriate before any Justice of this Court then presiding at Special Term, Part I; and lastly, it is

ORDERED that upon compliance with the order for discovery and inspection hereby, defendants may renew their motion for summary judgment before any Justice of this Court then presiding at Special Term Part I.

Each of the defendants are reminded that pursuant to an order of this Court (Geiler, J) dated September 23, 1981, each is under an obligation to ensure that the letter in question is not destroyed, altered or modified until discovery and inspection thereof has been completed.

PAUL T. D'AMARO, J.S.C.

April 26, 1982

APPENDIX G

SUPREME COURT – STATE OF NEW YORK
SPECIAL TERM, PART I, SUFFOLK COUNTY

No. 17,935

OAK BEACH INN CORP., *et al.*,

Plaintiffs,

against

BABYLON BEACON, INC., etc., *et al.*,

Defendants.

PATRICK KEVIN BROSNAHAN, JR. ESQ.
73 West Main Street
Babylon, New York 11702
Plaintiff's Attorney

REBORE AND THORPE, P.C.
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Defendant's Attorney

Present: HON. FRANK P. DE LUCA, Justice

Upon the following papers numbered 1 to 13 read on this motion for discovery/Order to Show Cause and supporting papers 1-9; Answering Affidavits and supporting papers 10-11; Replying Affidavits and supporting papers 12-13; it is,

ORDERED that this motion by plaintiff for an Order compelling defendants to disclose the author of an anonymous letter published by defendants is granted.

Pursuant to CPLR Rule 3120 subdivision (a),1.,(i), any party after commencement of an action may serve notice for discovery and inspection of documents. There is no authority supporting the proposition that one party has

priority in discovery of this type over another or that issue must be joined.

Defendants shall permit plaintiff to obtain a copy of the letter in question on November 2, 1981 at 10:00 A.M. at defendants' place of business. Plaintiff shall serve a copy of this Order with notice of entry ten (10) days prior to the discovery date.

The order of Mr. Justice Geiler dated September 23, 1981 which orders defendants to ensure that the letter in question is not destroyed, altered or modified is continued until discovery thereof has been completed.

84-575

No. ____

Supreme Court, U.S.
FILED
DEC 15 1984
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1984

Oak Beach Inn Corp.
and
Robert W. Matherson,
Petitioners,

against

Babylon Beacon, Inc., d/b/a
Babylon Beacon Newspaper,
Edward D. Wolfe and Jane D. Wolfe
and
John and/or Jane Doe(s)
being and intending to be the writer(s)
of a "Letter to the Editor" in the
April 9th edition of the Babylon Beacon,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of The Case	1
Summary Of Argument	3
Argument -	
1. There Are No Special And Important Issues Warranting Review	4
2. The Questions Raised On This Petition Were Not Raised In The Court Below . . .	4
3. New York State's Shield Law Does Not Violate Petitioners' Equal Protection and Due Process Rights . .	4
4. The Record Is Not Adequate For A Consideration Of The Issues Petitioner Seeks To Review	7
Conclusion	8

TABLE OF AUTHORITIES

Page

Baker, et al v. F & F Investment, et al, 470 F2d 778 2 Cir (1972) . . . 6

Branzburg v. Hayes, 408 US 665 (1972) . 6

Fischer, et al v. McGowan, et al, 479 FS 522 (DCRI 1984). 3, 6

Franklin Life Ins. Co. v. William J. Champion Co., 350 F2d 115, 6 Cir (1965) 6

Gertz v. Welch, Inc., 418 US 323(1974). 5

Lawn v. United States, 355 US 339 . . . 3, 4

Mazzella, et al, v. Philadelphia Newspapers, Inc., 479 FS 522 DCED NY (1979) 6

Paul v. Davis, 424 US 693(1976) . . . 6

Ex Parte Sparrow, 14 FRD 351 DC ND ALA (1953) 6

STATEMENT OF CASE

This case involves an interpretation of New York Civil Rights Law §79(h) (the Shield Law) and of New York Civil Practice Laws and Rules (CPLR 3102(c), 3120, 3126).

The issues were raised when petitioners sought to compel respondents to disclose the identity of an anonymous writer to their "Letters to the Editor" column so that petitioners could sue the writer for libel. The New York State Court of Appeals ruled that under New York State's Shield Law, respondents could not be required to disclose the identity of the anonymous source (CPLR 3102(c)).

Petitioners also argued, belatedly, as pointed out by the Court of Appeals, that they also needed to know the identity of the letter writer to prove actual malice on the part of respondents. The Court of Appeals held that striking respondents' answer and exposing them to a default judgment for failing to disclose its source was too severe a sanction under

CPLR 3126 and ruled that the lower court should have limited its order to requiring respondents to defend the allegation of malice by relying on proof of its own independent investigation, without placing any reliance on its source.

When petitioners originally moved for an order compelling respondents to disclose the identity of its source, respondents cross-moved for an order of summary judgment dismissing the action. A decision on respondent's cross-motion for summary judgment has been held in abeyance pending a final determination of the validity of the lower court's order striking respondents' answer. Now that that order has been reversed, the lower court must address respondents' request for summary judgment dismissing the action.

Furthermore, a motion for summary judgment automatically stays all discovery under New York State procedure (CPLR 3214(b)) and no discovery in this action has been held. The case is in fact, only at the pleading stage.

SUMMARY OF ARGUMENT

This case presents an interpretation of New York State's Shield Law and its discovery statutes. It does not present any of the considerations normally required for review under Rule 17.

Petitioner's arguments of equal protection and due process were never raised in the Court below and the questions should not be reviewed, Lawn v. United States, 355 US 339, 362-363 n. 16(1958).

New York State's Shield Law does not violate petitioner's equal protection and due process rights, Syd Fischer, et al, v. Andrew Mc Gowan, et al, 479 FS 522(DC RI 1984).

The record is not ripe for a determination of the issues raised.

1. There Are No Special And Important Issues Warranting Review.

The decision of the New York State Court of Appeals is limited to an interpretation of New York's Shield Law (Civil Rights Law 79(h)) and its discovery statutes (CPLR 3102(c), 3120, 3126). These are matters of state law and have no application beyond the boundaries of the state.

2. The Questions Raised On This Petition Were Not Raised In The Court Below.

Petitioners' arguments of equal protection and due process were never raised by petitioners' in the New York State Courts and those Courts did not consider any such questions. Not having been raised in the Courts below, and there being no special circumstances, the questions of equal protection and due process should not be reviewed by this Court, Lawn v. United States, 355 US 339, 362-363 n.16 (1958).

3. New York State's Shield Law Does Not Violate Petitioners' Equal Protection and Due Process Rights.

New York adopted a Shield Law 14 years ago.

In approving the legislation, New York Governor Rockefeller stated:

> "The bill protects journalists and newscasters from charges of contempt in any proceeding brought under State law for refusing or failing to disclose information or sources of information obtained in the course of gathering news for publication.
> ***
> Freedom of the press is one of the foundations upon which our form of government is based. A representative democracy, such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news.
> The threat to a newsman of being charged with contempt and of being imprisoned for failing to disclose his information or its sources can significantly reduce his ability to gather vital information." (NY Legis Ann, 1970, p 508)

An action for defamation is a state created cause of action and solely a matter of state law, Gertz v. Welch, Inc. 418 US at 342. The State of New York has clearly stated that the gathering and protection of the source of news is of greater importance to the public interest than a defamation action plaintiffs need to gather information of actual malice. The legislature's decision to favor the public interest in access to information over an in-

dividual's common law right to vindicate reputation does not violate any constitutionally protected right. Paul v. Davis, 424 US 693, (1976); Louis Mazzella, et al v. Philadelphia Newspapers, Inc. et al, 479 FS 522 DCED NY (1979); Fischer v. McGowan, supra; Ex Parte Sparrow, 14 FRD 351 DC ND ALA, (1953); also see Charles Baker et al v. F & F Investment et al, 470 F2d 778, 2nd Cir., (1972)(Civil rts. case. Blockbusting. Balance of interest favors non-disclosure); Franklin Life Ins. Co. v. William J. Champion Co., 350 F2d 115, 6 Cir, (1965) (Physician-patient privilege does not violate due process and equal protection).

Furthermore, as this court noted in Branzburg v. Hayes, 408 US 665, at 706,

> " . . . At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their

> own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute."

4. The Record Is Not Adequate For A Consideration of The Issues Petitioner Seeks To Review.

Petitioners argue that the decision of the New York State Court of Appeals which protects the right of respondents' not to disclose the source of a letter to its editor will make it impossible for respondents to meet the actual malice test. There is, however, nothing in the record to support this contention.

This case is only at the pleading stage. No discovery has been held and a motion by respondents to dismiss the action is pending. Plaintiffs have not established that the publication was libelous, or if libelous, that it was false. Furthermore, in the absence of any record as here, petitioners have no basis upon which to argue that the information is

not available from some other source or even that the information is in fact, necessary to establish actual malice on the part of the respondents.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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